Small Business Regulation and Legislation Update

Amy Kim, WOSB Program Manager
Office of Government Contracting

FY15 Federal Gov't Small Business Goal Attainment

	Goal	Achieved	Notes
SB	23%	25.7462%	Third consecutive year
SDB	5%	10.0570%	Highest ever
WOSB	5%	5.0546%	Highest ever
SDVOSB	3%	3.9263%	Highest ever
HUBZone	3%	1.8230%	

U.S. Small Business Administration

SBA Final Rule - Limitations on Subcontracting (LOS)

- 81 FR 34243 (May 31, 2016)
- Effective June 30, 2016
- To implement Section 1651 NDAA of 2013
- Similarly situated entities (SSEs): Entities in the same socio-economic category as the prime contractor AND small for the NAICS code that prime assigns to subcontract
- Shift from prime's performance requirement to a limit on % of subcontracting to non SSEs.

SBA
U.S. Small Business Administration

SBA Final Rule - Limitations on Subcontracting (LOS)

- May not expend more than a required % of amount paid to prime contractor and SSEs

Acquisition Type	%
Services	50%
Supplies*	50%
General Construction	85%
Special Trade	75%

* Cost of materials is excluded.

- Supplies acquisition: Nonmanufacturers must comply with the NMR. If there is an NMR waiver, value of items subject to a waiver will not be considered.
- Mixed contracts: The NAICS code selected by the CO determines as to which limitation of subcontracting applies.

SBA
U.S. Small Business Administration

Mixed Contracts – LOS Compliance

	Example 1	Example 2
Total Value	$3M	$3M
Services	$0.5M	$2.5M
Supplies	$2.5M	$0.5M
Cost of Materials	$0.5M	Not relevant
NAICS Code Selected	Mfrg	Services
LOS Calculation Base	**$2M**	**$2.5M**

U.S. Small Business Administration

Nonmanufacturers- LOS Compliance

	Example 1	Example 2	Example 3	Example 4
Total Value	$1M	$1M	$1M	$1M
# of Items Acquired	One	10	10	10
Small Business Manufacturers?	No	Yes for 9 Items ($990K)	Yes for four ($400K)	Yes for eight ($800K)
		No for one item ($10K)	No for six ($600K)	No for two ($200K)
NMR Waiver	Yes, individual	Yes, class	Yes, individual	Not required to seek individual waiver
Limitations on Subcontracting	Supply LB manufactured item	50% of $990K must be supplied by domestic small business mfrers	50% of $400K	Source some from SB and LB without a waiver

U.S. Small Business Administration

SBA Final Rule - Limitations on Subcontracting

- Work performed by similarly situated entities is not considered as subcontracting
- Any work not performed by similarly situated sub with its own employees will be considered subcontracted.

	Example 1	Example 2	Example 3
Procurement	SDVOSB Sole-source	Competitive 8(a)	WOSB Set-aside
Supplies or Services	Supplies	Services	Services
Total $	$500K	$10M	$1M
Cost of Materials	$100K	N/A	N/A
SubK $	$204K	$8M	$500,001
Sub(s)	SDVOSB	8(a)	SDVOSB
LOS Compliant?	Y	Y	N

U.S. Small Business Administration

SBA Final Rule – Limitations on Subcontracting

- Period to determine LOS compliance:
  - Base and each option term
  - Performance period for orders set aside under F&O contracts
- Work performed by independent contractors shall be considered a subcontract unless they meet SSE criteria.
- LOS does not apply to small business set-asides over $3.5K but below $150K.

U.S. Small Business Administration

SBA Final Rule - Size

- Joint venture – Any JV will be considered small as long as each member qualifies as small under size standard.
- Rebuttable presumption of affiliation among family members, firms which derive 70% of revenue from another firm
- Recertification required where acquisition occurs after offer but prior to award

U.S. Small Business Administration

SBA Final Rule – NMR

- A NMR waiver means firms can supply the product of any size regardless of place of manufacture. However, the waiver has no effect on the Buy American Act or the Trade Agreements Act.
- NMR does not apply to small business set-asides valued between $3.5K and$150K.
- Rental of item is a service and treated as such.
- Multiple Item Acquisitions:

1) If 50% of total value may be satisfied by small business mfrers, a waiver is NOT required.
2) If more than 50% is supplied by LBs, a waiver is required.

SBA
U.S. Small Business Administration

SBA Final Rule – NMR

- CO must request waiver of the NMR prior to posting solicitation, and must notify potential offerors of applicable NMR waivers.
- SBA may grant individual waivers after contract award in case of in-scope mods.

U.S. Small Business Administration

SBA Final Rule – NMR

- SBA may grant individual NMR waiver for software purchase, provided software is:

1) Sold, leased, or licensed to public;
2) Sold in substantial quantities in commercial market place; or
3) Offered to Gov't without modification in same form sold in commercial marketplace

- Software is being treated as a product or item.
- If service > item, procurement should be a service procurement.
- Subscription, remote hosting or server applications considered as services and no NMR waiver will be granted.

SBA
U.S. Small Business Administration

SBA Final Rule – ITVAR

- 81 FR 4436 (Jan. 26, 2016)
- NAICS 541519 Exception, Footnote 18
- Size Standard: 150 employees
- VAR must be ≥15% and ≤50%, as measured by total contract price.
- Manufactures products or supply the products of a small business unless SBA grants a waiver.
- If VAR < 15%, classify under mfrg
- If VAR > 50%, classify under service

U.S. Small Business Administration

SBA Final Rule – WOSB Sole Source

- 80 FR 55019 (Sep 14, 2015), effective Oct. 14, 2015
- FAR interim final rule effective Dec. 31, 2015
- WOSB/EDWOSB sole source permitted if
  - Designated industries by NAICS code;
  - Rule of two is not met;
  - Value: ≤ $6.5 million for mfrg or ≤ $4 million for services;
  - Contractor determined to responsible; and
  - Award made at a fair and reasonable price

U.S. Small Business Administration

SBA Final Rule - WOSB NAICS

- Section 825 of NDAA 2015
- SBA must conduct new study of industries where WOSBs are underrepresented by Jan. 2016 – Study sent to Congress
  - 81 FR 11340 (Effective Mar. 3, 2016)
  - 80 EDWOSB NAICS
  - 365 WOSB NAICS
  - 445 Total 6-digit NAICS

  - www.sba.gov/wosb

U.S. Small Business Administration

SBA Advanced Notice - WOSB Certification

- Section 825 of NDAA 2015 ended the self-certification option;
- Certification by Federal agency, a State gov't, SBA, or nat'l certifying entity approved by SBA
  - Advanced notice of proposed rulemaking issued
  - 80 FR 78984 (Dec. 18, 2015)
  - Comment period closed Feb. 16, 2016.

U.S. Small Business Administration

NDAA 2016

- Section 868 – SBA Scorecard
  - 50% prime contracting
  - 50% subk, number of SBCs awarded contracts, number of SBCs awarded subks
- Section 870 – OSDBU – notice from SBC that solicitation unduly restricts SBC's ability
- Section 871 – SES responsible for meeting subk goals
- Section 864 – NMR not applicable to services or construction; applicable only to supplies

SBA
U.S. Small Business Administration

NDAA 2016

- Section 863 – Substantial bundling – a notice must be published at least 7 days before solicitation
- Section 867 – Allows past performance of all team members to be considered for bundled or consolidated contracts
- Section 866 – HUBZone – includes disaster areas, expands BCA, allows ownership by NHOs
- Section 869 – Authorizes petitions for reconsideration of industry size standards with OHA

SBA
U.S. Small Business Administration

Questions?

SBA
U.S. Small Business Administration